
Report of the District of Columbia Child Support Guideline Commission

**Final Recommendations
July, 2004**



Composition of the Child Support Guideline Commission:

Chaired by Marceline D. Alexander, currently Interim Administrator of the Youth Services Administration in the District of Columbia Department of Human Services, and formerly Chief, Legal Services Section of the Office of Corporation Counsel's Child Support Enforcement Division, the Commission includes:

- The Honorable Judith Bartnoff, Associate Judge, Superior Court of the District of Columbia.
- Barbara Chandler Cleveland, formerly with the National Partnership of Community Leadership
- Chris Hart-Wright, Executive Director, STRIVE DC, Inc.
- Kristin Henrikson, attorney, Legal Aid Society of the District of Columbia
- Christopher J. Herrling, attorney, Wilmer Cutler Pickering Hale & Dorr, L.L.P.
- The Honorable Noel Johnson, Magistrate Judge, Family Court, Superior Court of the District of Columbia
- Margaret J. McKinney, attorney, Delaney, McKinney & Clark, L.L.P.
- The Honorable Kathleen Patterson, Chair, Judiciary Committee of the Council of the District of Columbia

Acknowledgements:

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Jane Venohr, Study Director, and her two able staff from Policy Studies, Inc., Tracy Griffin and Lola Williams. Without the national expertise in guidelines issues and analysis, and state best practices possessed by these three professionals, as well as the rapid turnaround of Commission requests for new analysis, the Commission could not have completed its work.

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Jason Juffras, Senior Budget and Policy Analyst on the Judiciary Committee of the Council of the District of Columbia, who attended meetings on Councilmember Patterson's behalf and ensured that the Guideline's rationale and content will be understandable to the Council.

Laurie Ensworth, Jennifer Longmeyer-Wood, and Chrystal Mincey, of CSED, and Lynne Fender, on loan to CSED from the Urban Institute, who provided invaluable staff assistance to the Commission, as well as legal, policy and research advice.

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All of the private citizens and community organization representatives who attended the Commission's public meetings and hearings and offered thoughtful opinions.



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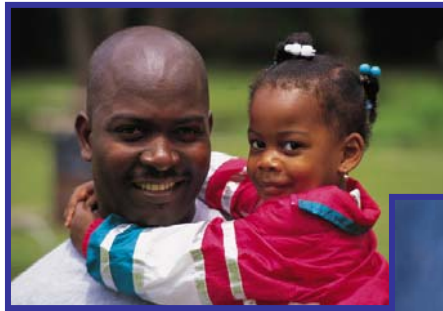
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Part I

Overview of Recommendations

INTRODUCTION

This report presents the findings and recommendations of the District of Columbia Child Support Guideline Commission (the Commission) in its review of the District of Columbia Child Support Guideline. The Child Support Guideline (the Guideline) constitutes the formula that is presumptively used to set the amount of child support for children whose parents are unmarried, separated, or divorced. With over 28,000 single parent families in the District of Columbia (2000 Census), the Guideline is an important instrument in reducing child poverty, improving the self-sufficiency of single parent households, and generally providing for the economic well being of children in the District. In addition, a fair and equitable Guideline helps promote voluntary settlement of legal actions involving child support, thereby reducing the demands on court time and mitigating the adversarial impact of such proceedings.

Because of the technical complexity of the Guideline, as well as its important role in domestic relations, domestic violence, and paternity and support cases, reviewing and updating the Guideline was the primary focus of the Commission in 2003-04. In addition, the Commission reviewed findings from a case file review to determine how the Guideline is being applied and the extent that deviations from the Guideline are made.

The Commission report is in two parts. This Part I presents the Commission's findings and recommendations, including a summary of its recommendations for changes to the Guideline. The Commission's recommendations were adopted unanimously with the exception of recommendations 22 and 24. The dissenting positions related to those two recommendations are noted in the Report. Part II is a detailed report on the proposed changes to the Guideline formula, including findings from the case file review and a Technical Appendix.

PURPOSE OF THE CHILD SUPPORT GUIDELINE COMMISSION

The Child Support Guideline Commission was created pursuant to District of Columbia Code § 16-916.02. The Code states that the Commission is to review the Guideline and general child support issues and make any recommendations for changes to the Mayor. The Code also states that the Commission must consider economic data, including poverty levels, and information on the functioning of the Guideline that the Commission gathers or that is brought to the attention of the Commission, for the purpose of recommending any changes to the Guideline.

In addition, the Family Support Act of 1988, codified at 42 U.S.C. § 667, mandates that states must review their guidelines every four years. Federal regulations implementing the Family Support Act, at 45 C.F.R. § 302.56, require that the review must include an assessment of the most recent economic data on child-rearing costs and a review of case data to ensure that deviations from guidelines are limited.

CHILD SUPPORT GUIDELINES: TODAY'S PERSPECTIVE

In the time that has passed between the adoption of the original Guideline in 1990 and the development of this new proposed Guideline, there has been additional research that bears on both the theoretical underpinning of child support guidelines and the nature of the populations they are designed to address. The demographics of the District of Columbia are particularly unusual, because a majority of families fall either at the low end or at the high end of the income scale. In the low-income environment, there is new and emerging research that has served to inform the development of the Guideline and that confirms the importance of getting the order “right” in the first instance to ensure compliance. The reason for ordering parents to pay child support is to benefit children, but the children only benefit from child support orders if parents actually pay. Accordingly, the Commission sought out and took into consideration research regarding compliance with child support orders as described below.

Recent literature shows that there is a correlation between how orders are set and payment compliance, confirming a generally accepted assumption regarding child support enforcement for low-income parents that compliance rates are lower when child support orders are premised on something other than documented income or ability to pay. In the average middle class case, higher orders do generate more money, at least in part because payment typically is made through wage withholding. In addition, as a general matter, the child support orders in those cases are set based on documented income. However, that is not the case for many low-income parents, who may not have regular employment or be salaried employees.

In July 2000, the Office of the Inspector General of the U.S. Department of Health and Human Services issued a report entitled *The Establishment of Child Support Orders for Low-Income Non-Custodial Parents* (OEI-05-99-00390). The study examined different ways in which child support orders were set and found that imputing income, setting retroactive orders, and minimum orders resulted in high support obligations that people did not pay. Imputing income to low-income parents with a legal duty to pay support caused particular difficulties: 44% of child support orders that were based on imputed income resulted in zero payment over the 32-month period studied. In contrast, only 11% of non-imputed orders generated zero payment over the same period. There was similar experience with retroactive orders and minimum orders, which also are not based on ability to pay.

Dr. Elaine Sorensen in *Examining Child Support Arrears in California: The Collectibility Study*, dated March 2003, also examined a number of areas where arrears had accrued. Where orders had been set at the TANF payment level, she found that 49% of parents with a legal duty to pay support had paid in the prior 12 months. In contrast, of other similarly situated debtors whose orders had been set based on ability to pay, 67% had paid in the prior 12 months.

Finally, a 2003 Washington State study of arrears, *Determining the Composition and Collectibility of Child Support Arrearages*, found that orders above 20% of income tend to generate arrears and that non-payment in low-income cases, especially when the payor was required to pay child support in multiple cases, often reflected very difficult family situations. Consequently, a number of states place a cap on orders for low-income parents with a legal duty to pay support. Massachusetts, a state known for its high guidelines and rigorous enforcement, establishes a minimum order at \$80 or 30% of income.

There is also research in the ethnographic field that “high” orders scare off potential payors and drive them away from involvement with their children. Dr. Earl Johnson in *Fathers’ Fair Share: Helping Poor Men Manage Child Support and Fatherhood* found this was often the case. He also found that the lack of accurate information on the street regarding how child support orders are set further alienated low-income fathers from the child support enforcement system and probably from their families. Dr. David Pate of the Center for Fathers, Families and Public Policy in his recent doctoral dissertation has similar findings. Finally, Geraldine Jensen, president of the Association for Children for Enforcement of Support, also agrees that orders should not be set too “high” or parents with a legal duty to pay support will be driven away.

The welfare environment has also changed, nationally and in the District, since the original Guideline was adopted. Child support offices are increasingly dealing with non-welfare cases – either never-welfare cases or former-welfare cases. At the same time, the policy emphasis has shifted from welfare recoupment to getting money into the hands of low-income families and moving them into the workforce. This has increased the importance of child care and the attendant costs, as well as medical support, as low-income families strive to support themselves without a safety net. The new Guideline addresses both these issues.

ACTIVITIES OF THE COMMISSION

During 2003, the Commission:

- ✓ Met once or twice a month from January to December 2003. All meetings were open to the public;¹

¹Minutes of the meetings are available for review at the Child Support Enforcement Division of the D.C. Office of the Attorney General.

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- ✓ Held three public hearings at different places, days, and times, to allow for maximum accessibility. The first hearing was held at the Reeves Municipal Center on Monday, May 19, 2003, from 7:00-9:30 pm; the second was held at Marshall Heights Community Development Organization on Tuesday, June 3, 2003, from 10:30 am – 1:00 pm; and the third was held at Savoy Elementary School on Saturday, June 7, 2003, from 12:00-3:00 pm. A notice of each public hearing was published in the D.C. Register, as well as on a variety of list serves. Notices also were posted at the Child Support Enforcement Division of the D.C. Office of the Corporation Counsel (now the D.C. Office of the Attorney General) and forwarded to the neighborhood collaboratives and other community organizations. At the hearings, the Commission received written and/or oral testimony from a variety of organizations and individuals, including the D.C. Office of the Corporation Counsel (now the D.C. Office of the Attorney General); the Legal Aid Society of the District of Columbia with endorsements in whole or in part by Ayuda, Inc., Bread for the City Legal Clinic, and D.C. Prisoners' Legal Services Project, Inc.; the Children's Rights Council; and Nancy D. Polikoff, Professor of Law at American University;²
 - ✓ Met twice with the Family Law Section of the District of Columbia Bar to hear the experiences of family law practitioners with the current Guideline, their concerns and opinions on issues relating to how child support orders should be set, and their suggestions for modifications to the Guideline;
 - ✓ Reviewed the basis of and principles underlying the current Guideline;
 - ✓ Analyzed case file data on the application of and deviations from the Guideline;
 - ✓ Performed a thorough economic analysis of the Guideline, with technical assistance from Policy Studies Inc.;
 - ✓ Examined how the current Guideline formula compares to those of bordering states;
 - ✓ Deliberated over a number of issues identified by the Commission and the D.C. Office of Corporation Counsel (now the D.C. Office of the Attorney General), in the public comments, and from findings of the case file review;
 - ✓ Reviewed how other states treat these issues, the policy assumptions behind different approaches, and their impacts; and
 - ✓ As required by D.C. Code § 16-916.02, submitted to the Mayor its "Report of the District of Columbia Guideline Commission: Initial Recommendations" by December 31, 2003.

During 2004, the Commission:

- ✓ Met once or twice most months from January to June 2004. All meetings were open to the public;³

²Transcripts of the hearings and copies of the written testimony are available for review at the Child Support Enforcement Division of the D.C. Office of the Attorney General.

³Minutes of the meetings are available for review at the Child Support Enforcement Division of the D.C. Office of the Attorney General.

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- ✓ Received public comments on its “Initial Recommendations” in writing and at a public meeting on February 12, 2004, from a variety of organizations and individuals, including the America Fathers Coalition; Donald J. Bieniewicz; Stacy L. Brustin, Margaret Martin Barry, Catherine F. Klein, and Ellen M. Scully, Professors of Law at the Columbus School of Law, Catholic University; the Center for Law and Social Policy; Feldesman Tucker Leifer Fidell LLP; Nancy Glassman; the Legal Aid Society of the District of Columbia; and Nancy D. Polikoff, Professor of Law at American University;
 - ✓ Deliberated over a number of issues identified in the public comments on its “Initial Recommendations;” and
 - ✓ Submitted to the Mayor its “Report of the District of Columbia Guideline Commissions: Final Recommendations.”

From these analyses and public comments, the Commission has developed 25 recommendations.

OVERVIEW OF THE COMMISSION FINDINGS

The goals of the Commission in reviewing the Guideline were to address the needs of children and the ability of parents to pay, to provide for more consistency and predictability in child support orders, to propose a Guideline that is and appears fair, and to ease the administration of child support cases, both in establishing and modifying orders.

To meet these goals, the Commission developed a comprehensive, integrated report and a revised Guideline. Although the recommendations can be roughly grouped in four categories, almost all are interrelated and must be considered in the overall context of the Guideline as a whole. To attempt to segregate individual issues without regard to their interrelationship will defeat the purpose of the review and recommendations.

The four categories of recommendations are as follows:

- ***Recommendations Pertaining to Parents’ Incomes Used to Determine Support.*** This includes recommendations to clarify, expand, and specify what should be considered income for purposes of calculating child support and how income is determined and verified. The Commission believes that the Guideline calculation should continue to be based on parents’ gross incomes, but there are certain obligations that should not be considered income or that should be deducted from income, for the reasons explained below. This category also includes recommendations pertaining to the adjustment for multiple families.
- ***Recommendations Pertaining to the Guideline Formula and Its Parameters.*** This includes recommendations to update the formula based on more current measurements of child-rearing costs and other economic factors. It also includes recommendations regarding circumstances that may not apply to every case (e.g.,

health care expenses, child care expenses, minimum orders, and shared custody), but that are an essential component of a comprehensive and fair Guideline.

- ***Recommendations Pertaining to Variation and Departure Factors.*** The current Guideline allows a variation in the presumptive Guideline formula of plus or minus three percent. In accordance with federal requirements, the current Guideline also allows departures from the presumptive Guideline formula in specified circumstances. The Commission recommends that the variation and departure factors be combined into a single list of departure factors and that reasons be required to be stated for all departures, which should lead to more predictability and less litigation.
- ***Other Recommendations.*** There are a few miscellaneous recommendations that do not fit into any of the above categories. They address a variety of issues, including a requirement for judicial officers to inquire about child support in all domestic relations and domestic violence cases; when the revisions to the Guideline constitute a change of circumstances warranting modification of an existing child support order; and presumptive limitations on retroactive support.

THE 25 RECOMMENDATIONS

Exhibit I-1 summarizes the 25 recommendations. Each of the recommendations is also discussed separately below in greater detail. This is followed by a brief discussion of other issues that the Commission considered, but decided did not warrant a change in the Guideline. A mark-up of District of Columbia Code § 16-916.01 that incorporates these recommendations is provided in Appendix I.1.

As is evident in the detailed discussion, many of these recommendations are interrelated. They are predicated on the following general objectives:

- The Guideline should treat cases with similar circumstances equally;
- The adjustments applicable to the income of the parent with a legal duty to pay support should also be applicable to the income of the parent to whom support is owed, and vice versa;
- The Guideline formula should reflect current economic realities, including the current costs of child rearing and the parents' ability to pay; and
- Parents should share in certain expensive child-related costs, such as child care, health insurance, and extraordinary medical expenses.

EXHIBIT I-1
SUMMARY OF RECOMMENDATIONS
DEVELOPED BY THE CHILD SUPPORT GUIDELINE COMMISSION

Recommendations Pertaining to the Parties' Incomes Used to Determine Support

1. Specify sources of income verification.

EXHIBIT I-1
SUMMARY OF RECOMMENDATIONS
DEVELOPED BY THE CHILD SUPPORT GUIDELINE COMMISSION

2. Exclude means-tested income.
3. Subtract from income alimony paid to the other parent in the instant case; add to income alimony received from any source, regardless of whether it is received from the other parent in the instant case. The adjustment is to be equally applied to both parents.
4. Include Social Security Disability Insurance (SSDI) derivative benefits in the gross income of the parent from whom the benefits derive. In addition, if the benefits derive from the parent with a legal duty to pay support, credit the benefits against that parent's child support obligation.
5. Allow a deduction from income of one half of Social Security and Medicare taxes due and payable on current income by self-employed parents.
6. Exclude income of parents' other children.
7. Specify when potential income may be imputed to a parent.
8. Exclude income of third parties.
9. Clarify the definition of a "dependent" used for the multiple family adjustment.
10. Revise the multiple family adjustment such that it can be equally applied to both parents and comports with Guideline formula revisions.

Recommendations Pertaining to Guideline Formula and Its Parameters

11. Base the Guideline formula on more recent economic data, including the measurements of child-rearing costs developed by Dr. David Betson using the Rothbarth methodology.
12. Treat the Guideline formula as base support and add to it child care costs, premium costs of the child's health insurance, and the child's extraordinary medical expenses.
13. Allow either parent to receive credit for paying child care costs, the premium costs of the child's health insurances, and the child's extraordinary medical expenses.
14. Prorate the additional costs of child care, premium costs of the child's health insurance, and the child's extraordinary medical expenses between the parents.
15. Eliminate the income disregard for the parent to whom support is owed, which includes his or her child care costs.
16. Increase the self-support reserve for the parent with a legal duty to pay support and revise the formula to better protect the integrity of the self-support reserve.
17. Cap the amount of child support that can be ordered to reflect Consumer Credit Protection Act income withholding limits for child support.
18. Eliminate the adjustment for the age of the child.
19. Lower the timesharing threshold for applying the shared custody adjustment.
20. Apply the shared custody adjustment presumptively.

Recommendations on Guideline Variation and Departure Factors

21. Eliminate the variation of plus or minus three percent, consolidate the variation factors with the departure factors, and require that reasons for departures be stated.
22. Add additional departure factors for (a) parents with a legal duty to pay support who are 18-years old or younger and full-time students; and (b) cases where the child is a respondent in an abuse or neglect case and placed outside the home, and the goal of the case is reunification with the parent(s).

Other Recommendations

23. Require judicial officers to inquire about child support arrangements in all domestic relations and domestic violence cases.
24. Limit retroactive support to 24 months prior to the date of filing of the petition for support, with exceptions in cases presenting extraordinary circumstances. Also, credit verified voluntary payments against an award of retroactive support.

EXHIBIT I-1
SUMMARY OF RECOMMENDATIONS
DEVELOPED BY THE CHILD SUPPORT GUIDELINE COMMISSION

25. Revise the review and modification criteria to allow a change in circumstances to include changes to the Guideline that result in at least a 15 percent difference from the existing order amount.

Recommendations Pertaining to the Parties' Incomes

Recommendation 1: Specify Sources of Income Verification

The Commission recommends adding a provision to the Guideline requiring competent evidence to document the parents' incomes, including, but not limited to, paystubs, tax returns, employer statements, affidavits and oral testimony provided under oath.

The current Guideline does not address how income is to be verified. The recommended language provides that income must be proved by competent evidence. It lists some types of proof of income that are common in child support cases, but permits other types of evidence to prove income, consistent with the usual role of a judicial officer to make determinations about what constitutes admissible and reliable evidence. The majority of state guidelines that address verification of income have similar provisions.

Recommendation 2: Exclude Means-Tested Income

The Commission recommends excluding income from means-tested public assistance programs, such as Temporary Assistance for Needy Families (TANF), Program on Work, Employment and Responsibility (POWER), General Assistance for Children (GAC), Supplemental Security Income (SSI), and Food Stamps.

The current Guideline is silent on the treatment of means-tested income. The Commission received public testimony that as a result, there is no consistent policy or practice, and similarly situated parents may be treated differently when determinations are made regarding their incomes, for purposes of deciding how much child support they should pay or receive. Almost all states exclude means-tested income from the definition of income in the calculation of child support on policy grounds, given that the purpose of public assistance is to help provide for the most basic needs of children living in poverty. The Commission is recommending that the District of Columbia clarify the Guideline and explicitly adopt the policy of the majority of states in this regard, to avoid confusion and inconsistencies in application of the Guideline.

Recommendation 3: Subtract/Add Alimony Paid/Received

The Commission recommends that alimony be treated the same between the parents. This means that any alimony paid by a parent to the other parent in the instant case shall be deducted from the paying parent's gross income prior to the determination of child support; any alimony received by a parent, regardless of the source, shall be added to that parent's gross income prior to the determination of child support.

The current Guideline provides that spousal support received from any source shall be added to the receiving parent's gross income. The Commission's recommendation expands on that principle by deducting alimony paid by one parent to the other parent in the instant case from the gross income of the paying parent.

The Commission considered whether to allow both parents to deduct from their gross incomes all alimony paid to a former spouse, regardless of whether paid to the other parent in the instant case, but ultimately rejected the suggestion. The Commission was concerned that such a deduction from income may work to the disadvantage of children, in that a parent could structure her/his alimony obligations to another spouse so as to diminish the income s/he has available to support her/his children with another parent.

Recommendation 4: Factor Social Security Disability Insurance Benefits into the Guideline Calculation

Disabled parents may receive Social Security Disability Insurance (SSDI). The amount of the SSDI benefit depends on the parent's historical earnings and FICA contributions. If a parent receives SSDI, the Social Security Administration sends a portion of that SSDI directly to the parent's children. The benefits received by the children are called SSDI derivative benefits.

The Commission recommends that the amount of the SSDI derivative benefit be factored into the child support calculation as follows: (a) count the total amount of the SSDI benefit, including the amount of the derivative benefit, as gross income of the parent from whom the benefit derives; (b) calculate the Guideline amount; and (c) subtract the amount of the SSDI derivative benefit from the Guideline amount to arrive at the final child support award. If the SSDI derivative benefit is greater than the child support award in step (b) above, the Commission recommends that the order be set at zero. The Commission also recommends that any SSDI derivative benefits that are paid prior to the filing of a petition for support or motion to modify support be counted toward any retroactive support or accumulated arrears.

The current Guideline does not specifically address how SSDI benefits and derivative benefits should be counted in calculating the child support award. Most states that address the issue factor it into the guidelines calculation in a manner similar to what is being recommended. Where the SSDI derivative benefit derives from the parent with a legal duty to pay support, it makes sense to credit the amount of the derivative benefit against that parent's child support obligation, since the benefit derives from and is intended to replace the earnings of that parent.

Recommendation 5: Subtract One-Half of Social Security and Medicare from Income of Self-Employed Parents

The Commission recommends adding a provision to the Guideline to allow the deduction of one-half of Social Security and Medicare⁴ taxes due and payable on current income by self-employed parents.

⁴ In its initial recommendations, the Commission recommended a deduction of one-half of Social Security taxes only. However, after consideration of a public comment on this issue, the Commission decided to expand the deduction to one-half of Social Security and Medicare taxes.

This will account for the additional FICA and Medicare contributions paid by self-employed parents, thereby putting them on the same footing as salary or wage earners whose FICA and Medicare contributions are paid in part by their employers. By failing to take into account the different tax burden of a self-employed individual, the current Guideline penalizes those individuals by crediting them with significantly more income than they actually receive, to the extent that they have to pay both the employee and employer portions of income tax.

Recommendation 6: Exclude Income of a Parent's Other Children

The Commission recommends adding language that would explicitly exclude income of children who are not at issue in the instant case.

The existing Guideline does not specifically address income received by children in a parent's home who are not at issue in the instant case. Public testimony identified this as another area that should be clarified in the Guideline, to avoid inconsistent treatment of similarly situated parents in different cases. The Commission decided to exclude the income of other children in the home of one of the parents, because any such income is usually intended for the support of the other child. That other child has no legal or financial responsibility to the child for whom support is being determined, and that other child's income is not income of either of the parents who are legally and financially responsible for the child for whom support is being determined.

Recommendation 7: Specify when Potential Income May Be Imputed

The Commission recommends adding a provision that income may be imputed to either parent if the court finds that the parent is voluntarily unemployed or underemployed in an attempt to avoid or minimize his or her child support obligation, or to maximize the other parent's obligation. The Commission also recommends that income should not be imputed to a parent who is receiving means-tested public assistance benefits, or to a parent who is physically or mentally incapacitated and who has no income earning potential or other resources available to pay child support. The Commission also recommends that written factual findings be required when income is imputed to a parent.

Although the existing Guideline does not specifically address the issue of imputing income to unemployed or underemployed parents, the District of Columbia Court of Appeals has made it clear that income may be imputed to a parent, in appropriate circumstances. The recommended provision is consistent with the case law. Most states have a provision similar to what is being recommended. The Commission's recommendation is more specific than the imputation provisions of some other jurisdictions, in recognition that this is a controversial issue that requires careful balancing. On the one hand, it is necessary and appropriate for income to be imputed to parents who are avoiding regular or verifiable employment in order to avoid paying child support at reasonable levels that they ought to be able to afford. On the other hand, as noted above, recent national research findings confirm that income imputation is frequently misapplied, particularly to low-income parents,

and results in order amounts that exceed the parent's realistic ability to pay. As a result, arrearages continue to accumulate with no reasonable likelihood of payment. The Commission believes the recommended provision strikes a fair balance between those concerns.

Recommendation 8: Exclude Income of Third Parties

The Commission recommends adding a provision that clearly excludes the income of third party caregivers from the calculation of support, and allows the court to order both parents to pay support when the child resides with a third party.

The recommendation is in response to public comment requesting clarification of how income of third parties is to be treated in the Guideline. The second part of the recommendation complements one of the premises of the Guideline that both parents share the responsibility to support the child.

Recommendation 9: Clarify "Dependent" in the Multiple Family Adjustment

The Commission recommends clarifying the definition of a "dependent." Specifically, a dependent is defined as a child living in the parent's household and for whom the parent owes a legal duty of support.

The current provision only includes the first part, "a child living in the parent's household." Adding the second part, "for whom the parent owes a legal duty of support," clarifies the definition. For example, it eliminates the possibility that a child of a roommate living with a parent could be considered. The Commission recognizes that there may be circumstances when someone takes on responsibilities for children for whom s/he has no legal support obligation, but those voluntary activities should not affect the parent's obligation to support her/his own children.

Recommendation 10: Revise the Multiple Family Adjustment and Apply it Equally to Both Parents

The Commission recommends revising the multiple family adjustment such that the adjustment applies equally to both parents. The Commission recommends calculating a theoretical child support obligation for the dependents of a parent who reside in the parent's home. Only that parent's income would be used to calculate the theoretical support and the number of children for whom support is calculated would be limited to those children actually residing in the parent's home to whom the parent owes a legal duty of support. To more fairly distribute resources among all of a parent's children, the theoretical obligation will be multiplied by 75 percent (i.e. reduced by 25 percent), and the resulting amount will be deducted from the parent's income prior to the calculation of child support in the instant case. The 25 percent reduction of the theoretical support amount is necessary to equalize support between the children for whom support is being determined and the children living with the parent. Otherwise, the children in the home would receive a larger share than the children for whom support is being determined. The theoretical child support obligation

(also known as a “dummy order”) method of adjusting for multiple families is used in 23 states.

Under the current Guideline [§ 16-916.01(p)], additional dependents of the parent with a legal duty to pay support and the parent to whom support is owed are treated differently. The Commission recommends that the disparity be rectified, such that both parents are credited with Court-ordered child support payments paid on behalf of another child and with other dependents in the parent’s home for whom the parent owes a legal duty of support.

Recommendations Relating to the Guideline Formula

Recommendation 11: Child Support Formula

The Commission recommends updating the Guideline formula in light of more current economic data, including new and more current measurements of child-rearing costs. The recommended formula is shown in Exhibit I-2.

EXHIBIT I-2 RECOMMENDED CHILD SUPPORT FORMULA

(e) Basic Child Support Obligation: The basic child support obligation shall be determined in accordance with the Schedule of Basic Child Support Obligations in subsection (2) of this section. The basic child support obligation shall be divided between the parents in proportion to their respective adjusted gross incomes. If the parents’ combined adjusted gross income falls between amounts shown in the Schedule, the basic child support obligation shall be rounded up to the next higher amount.

(1) Low Income and Minimum Orders:

(A) A parent with a legal duty to pay support, but with adjusted gross income below \$12,382 per year shall be considered unable to contribute the amount determined by the Schedule. Instead, a parent at this level of income shall be treated on an individual basis and shall be ordered to pay only the amount that the judicial officer determines he or she is able to pay, while still meeting his or her own subsistence needs.

(B) The presumptive, rebuttable minimum order shall be \$50 per month, where the judicial officer finds that the parent has the ability to pay the minimum order, while still meeting his or her own subsistence needs. The presumption can be rebutted downward to \$0 or upward above \$50 with evidence of resources and/or circumstances affecting the parent’s ability to pay, including, but not limited to, age, employability, disability, homelessness, incarceration, inpatient substance abuse treatment, other inpatient treatment, or other appropriate circumstances. A minimum order below or above \$50 shall be supported by written factual findings.

(2) Schedule of Basic Child Support Obligations:

| Excerpt of Schedule of Basic Child Support Obligations (Entire Schedule is Provided in Appendix I-A) | | | | |
|---|--------------|-----------------|-------------------|-----------------------------|
| COMBINED ADJUSTED GROSS INCOME | ONE CHILD | TWO CHILDREN | THREE CHILDREN | FOUR or MORE CHILDREN |
| 12,600 | 3310 | 4702 | 5488 | 6151 |
| 13,200 | 3444 | 4890 | 5705 | 6393 |
| 13,800 | 3577 | 5076 | 5919 | 6632 |
| 14,400 | 3695 | 5244 | 6113 | 6847 |
| 15,000 | 3810 | 5411 | 6306 | 7063 |

f) Combined Adjusted Gross Incomes Exceeding \$240,000: The Guideline shall not apply presumptively when the parents’ combined adjusted gross income exceeds \$240,000 per year. For cases that exceed this level of combined adjusted gross income, support shall not be less than the

EXHIBIT I-2
RECOMMENDED CHILD SUPPORT FORMULA

amount that would have been ordered if the Guideline had been applied to combined adjusted gross income of \$240,000, and may be more in the discretion of the judicial officer after a determination of the reasonable needs of the child, based on actual family experience. All such awards shall be supported by written factual findings.

(g) Calculation of Basic Child Support Obligation (Worksheet A): Except in cases of Shared Physical Custody as defined in section (o), Worksheet A found in section (u) shall be used in conjunction with the following steps to calculate the basic child support obligation to be paid by the parent with a legal duty to pay support.

- (1) Determine each parent's adjusted gross income according to section (d-1).
- (2) Using the parents' combined adjusted gross income, locate the basic child support obligation from the Schedule of Child Support Obligations in subsection (e)(2).
- (3) Calculate each parent's percentage share of combined adjusted gross income by dividing each parent's adjusted gross income by the combined adjusted gross income.
- (4) Multiply the basic child support obligation from step 2 by each parent's percentage share of combined adjusted gross income from step 3 to determine each parent's share of the basic child support obligation. When the parents do not have Shared Physical Custody as defined in subparagraph (o) below, the parent with whom the child does not primarily reside shall be the parent with a legal duty to pay support. The parent with a legal duty to pay support shall pay his or her share of the basic child support obligation to the other parent. Additional costs, if any, for health insurance premiums, extraordinary medical expenses, and child care shall be added to this amount according to subsections (h) through (j). The parent with whom the child primarily resides shall be presumed to spend his or her share directly on the child.

(h) Health Insurance Premiums:

- (1) All orders shall contain terms providing for the payment of medical expenses for the child in accordance with Section 16-916.
- (2) Actual amounts paid by either parent for health insurance premiums for the child at issue in the instant case shall be divided between the parents in proportion to their respective adjusted gross incomes and added to the basic child support obligation.
- (3) A parent shall present proof of the increase in a medical insurance premium incurred as a result of the addition of the child to the medical insurance policy. The proof provided shall identify clearly that the source of the increase of the medical insurance premium is the child who is the subject of the child support order. The cost to add the child shall be reasonable.
- (4) If a parent has family medical insurance coverage in the parent's medical plan for a second family, the addition of the child who is the subject of the child support order need not result in an additional cost of medical insurance coverage to the parent. The parent shall be required to provide proof that the child has been added to the medical insurance coverage. An adjustment shall not be made if there is no additional cost of medical insurance coverage to the parent.

(h-1) For purposes of subsection (h), medical insurance coverage shall be considered reasonable in cost if it is employer-related or other group medical insurance coverage, regardless of the service delivery mechanism.

(i) Extraordinary Medical Expenses:

- (1) Extraordinary medical expenses shall be divided between the parents in proportion to their respective adjusted gross incomes.
- (2) Extraordinary medical expenses, including copayments and deductibles, are defined as uninsured or unreimbursed medical expenses in excess of \$250 per year per child at issue in the instant case. Such expenses include, but are not limited to, such costs as are reasonably necessary for orthodontia, dental treatment, asthma treatments, physical therapy, vision care and any chronic health problems.
- (3) If the extraordinary medical expenses are recurring and can reasonably be predicted by the judicial officer at the time of establishment or modification of a child support order, the parent's proportionate share of the expense shall be added to the basic child support obligation. Other extraordinary medical expenses shall be paid by the parents in proportion to their adjusted gross incomes if, as, and when such expenses are incurred. If either parent advances payment for such expenses to a provider of services, the other parent shall reimburse that parent for his or her proportionate share of the expense within 30 days of receiving written proof of the expense and payment.

(j) Child Care Expenses: Reasonable actual child care expenses incurred for the child who is the subject of the child support order and due to the employment or education of either parent shall be divided between the parents in proportion to their respective adjusted gross incomes and added to the basic child support obligation. Child care expenses shall be determined by actual family experience, unless the judicial officer determines that the actual family experience is not in the best interest of the child. If there is no actual family experience or if the actual family experience is not in the best interest of the child, the judicial officer shall determine a reasonable child care expense based on the cost of child care from a licensed source or, if the primary residential parent chooses child care with an actual cost that is less than the level required to provide child care from a licensed source, the actual cost of the child care expense.

Part II of this report provides a detailed account of the development of this formula and the economic factors considered at length by the Commission. As evident by the report, there are many complex, technical issues. The key considerations and decisions are summarized below.

- One objective of the Commission is to update the formula to reflect current economic factors, including more recent measurements of child-rearing costs, and the ability of parents to pay. The existing formula was developed in 1987, slightly modified in 1990, and has not been modified since 1990.
- Another objective of the Commission is to establish a formula that is applicable to higher income levels than the current formula. The current formula is presumptive up to gross incomes of \$75,000 per year for the parent with a legal duty to pay support. The new measurements of child-rearing costs will allow the formula to be presumptive up to a combined parental gross income of \$240,000 per year.
- The Commission considered three different measurements of child-rearing costs: United States Department of Agriculture (USDA) estimates; Engel estimates developed by Dr. David Betson, Professor of Economics, University of Notre Dame; and Rothbarth estimates also developed by Dr. Betson. An estimation methodology is necessary to separate the child's share of co-mingled family expenditures (e.g., utilities and transportation) from the adults' share.
- Dr. Betson originally developed his estimates in 1990 for the U.S. Department of Health and Human Services.⁵ Fulfilling a requirement of the Family Support Act of 1988, the explicit purpose of Dr. Betson's study was to provide information that could be used by states to develop and update child support guidelines. His original estimates were developed from the 1980-86 Consumer Expenditures Survey (CEX), which is conducted by the U.S. Bureau of Labor Statistics. Subsequently, Dr. Betson updated his measurements by applying the exact same methodologies he applied in 1990 to 1996-1999 CEX data.
- The Commission requested that its technical consultant develop a formula using the Betson-Rothbarth measurements based on the 1996-1999 CEX data.⁶ The Commission favors the Betson-Rothbarth measurements over other measurements because: (1) Dr. Betson, whose original study actually developed measurements from five different

⁵David M. Betson, *Alternative Estimates of the Cost of Children from the 1980-86 Consumer Expenditure Survey*, Report to U.S. Department of Health and Human Services (Office of the Assistant Secretary for Planning and Evaluation), University of Wisconsin Institute for Research on Poverty, Madison, Wisconsin (September 1990)

⁶Although some public comments criticized the use of the CEX date, they also admitted there was no better data source.

estimation techniques, recommends the Rothbarth measurements for use in state child support guidelines because the Rothbarth estimator is more theoretically sound than the other estimators and yields the most plausible results; (2) the Betson-Rothbarth measurements are the most frequently used by states— they form the basis of child support guidelines in 21 states; and, (3) the other measurements sometimes exceed what can be withheld from income for the payment of child support under the Consumer Credit Protection Act (CCPA).

- The recommended formula includes several technical changes to make it more consistent with the structure and patterns of the economic measurements of child-rearing costs. Given that the economic measurements of child-rearing costs are based on the incomes of both parents, the combined incomes of both parents are used to determine the appropriate basic support amount. The combined income amounts are presented in a schedule, which also lists the basic support amount at each income level. Absent a schedule, the formula for base support would read like a tax schedule with over a dozen income ranges and marginal rates to smooth the transition between these income ranges. The different income levels are necessary to reflect the measurements of child-rearing costs, which vary at different income levels.⁷
- One of the criticisms of using of the Betson-Rothbarth measurements to calculate child support is that, although in absolute terms expenditures for children continue to increase as family income increases, the amount spent on children decreases as a percentage of income at higher income levels. As a result, child support actually begins to decrease as a percentage of total family income, even though the dollar amount of support continues to increase. There is no real question from an economic perspective that this is the correct result, based on the data regarding family expenditures for children in intact

⁷ The 1987 Commission was also aware of these facts. Its solution was not to apply the formula presumptively at higher incomes, where the economic evidence indicates that the proportion of income devoted to child-rearing costs decreases. This also allowed it to base the Income Levels on noncustodial parent income only. The 1987 approach has proven to be insufficient for several reasons: because of the unintended results when the parent owing a duty of support earns less than the parent to whom support is owed; the significant number of households in the District of Columbia with incomes exceeding the \$75,000 limit; and changes in the Domestic Relations law of the District of Columbia since that time, including enactment of a presumption of joint custody.

families.⁸ Nonetheless, some comments also noted that at higher income levels, application of the Betson-Rothbarth formula can result in the children not receiving the full benefit of their parents' incomes when they are living in separate households. The Technical Appendix to this Report explains the relationship between expenditures and net income – child-rearing costs are measured based on family expenditures, which is not the same as net income, and may well be less.⁹ In particular, families at higher income levels often have investments and savings, as well as insurance, and if they own property, they typically make payments toward mortgage principal. Those payments affect the family's long-term financial health and security, even if they do not result in benefits that are realized immediately. But because they are not considered expenditures, they are not included in the measurement of child-rearing costs. In addition, inherent to most surveys is the issue of the underreporting of income. On further examination of the schedule of Basic Support in its initial recommendations, and taking into account the comments received, the Commission concluded that the amount of income devoted to child support was too low at the higher income levels. Accordingly, the Commission determined that an adjustment should be made to the schedule of basic support to increase the child support percentage at the point where, without any adjustment, the percentage otherwise would begin to decrease, and from that point, to apply the Betson-Rothbarth child-rearing expenditures to all net income. That adjustment is further discussed in the Technical Appendix. The Commission recognizes that there are economic arguments both for and against such an adjustment, but the Commission believes that the new percentages, which are incorporated in the recommended schedule of Basic Child Support Obligations, represent a reasonable compromise that provides a fair level of child support at both the higher and lower ends of the economic spectrum.

- Other economic factors that are included in the development of the recommended formula are: current (2003) price levels; the current (2004) poverty level; and current (2003) personal income tax rates and FICA. The Betson-Rothbarth measurements of child-rearing costs are updated to reflect 2003 price levels. The 2004 poverty level is part

⁸There are several tiers to this conclusion that vary with how child-rearing expenditures are expressed in relationship to total household expenditures and income. Specifically, measurements of child-rearing expenditures can be expressed as: a percentage of total expenditures; a percentage of net income; and as a percentage of gross income. (Each is a subset of the next; that is, child-rearing expenditures and other expenditures comprise household expenditures; in turn, household expenditures, savings, payment of housing principal, pension contributions, cash contributions and other non-current consumption comprise net income; and finally, net income and taxes comprise gross income.) Unequivocally, any of the authoritative measurements of child-rearing expenditures expressed as a percentage of gross income will decrease as gross income increases because of progressive federal tax rates. This is because even if the percentage of child-rearing expenditures is a constant percentage of total expenditures, the base of gross income gets smaller and smaller as the tax rate increases. A similar outcome is realized when child-rearing expenditures are expressed as percentage of net income because higher net income households spend less on current consumption goods than lower net income households. (Economists have observed this pattern about income and expenditures for over a century.) The trend pertaining to percentage of total expenditures devoted to child rearing is, however, more ambiguous. Dr. Betson finds that the percentage of total expenditures devoted to child rearing decreases as total expenditures increase based on the Rothbarth methodology and the trend is statistically significant, but other methodologies do not yield statistically significant trends.

⁹ There also are circumstances when expenditures can exceed net income: for example, when expenses are paid from savings or with borrowed funds.

of the low-income adjustment, which is discussed in more detail in Recommendation 16. Since child-rearing costs are measured as a proportion of total household expenditures, they are backed into a gross-income-based formula using personal income tax withholding formulas. (These technical issues are discussed in greater detail in Part II.)

Recommendation 12: Treat the Formula as Base Support and Provide Add-Ons for Substantial and Variable Costs

The Commission recognizes that child care costs, the costs of the child's health insurance premium, and the child's extraordinary medical costs (i.e., uninsured or unreimbursed expenses in excess of \$250 per year per child) may exceed the average amounts in the Betson-Rothbarth measurements, particularly since these expenses are averaged across all ages of children and families regardless of whether there were any child care or extraordinary medical expenses. Consequently, those costs often are not accounted for sufficiently in the baseline child support award under the current Guideline, although those costs can be substantial. Those costs also can vary a great deal from case to case, depending on the circumstances of the family and the needs of the child. Consequently, the Commission recommends that the actual amount of these costs be added to base support in the determination of the support award. The base formula does include average, ordinary medical expenses (i.e., up to \$250 per year per child) that are likely to be incurred for most children.

Under the current formula, child care and the health insurance premium costs are unequal deductions from income, the former a deduction from the income of the party to whom support is owed and the latter a deduction from the income of the party with a legal duty to pay support. That approach is inadequate to address these highly variable and often significant costs. Moreover, the current formula results in the support-receiving parent paying a disproportionate share of the child care costs, thus reducing the funds available to shelter, feed and clothe children. (This is discussed in further detail in Part II.). The current formula also does not consider ordinary medical expenses, and although extraordinary medical expenses can be grounds for variations and departures from the Guideline amount, they often are not addressed adequately. The Commission therefore recommends that these categories of expenses be treated as add-ons to the base support, to insure that these recognized needs of the child are fully considered in all child support determinations.

Recommendation 13: Allow Either Party Credit for Direct Expenses

The Commission recognizes that either party may directly pay child care costs, the child's health insurance premium, or the child's extraordinary medical expenses. The Commission recommends that any credit for these direct expenses be given to the parent paying the expense.

The current Guideline fails to account for the reality that both parents often pay direct expenses for their children. The current Guideline considers child care when it is paid by the parent to whom support is owed, but not when it is paid by the parent with a legal duty

to pay support. Similarly, the current Guideline considers the health insurance premium when it is paid by the parent with a legal duty to pay support, but not when it is paid by the parent to whom support is owed. There is no reason for credit for these expenses to be given to one parent and not the other. There also may be circumstances when credit should be given to both. The Commission's recommendation gives credit to whichever parent pays the expense.

Recommendation 14: Prorate Additional Costs between the Parties

The Commission recommends that actual and reasonable child care costs, the child's health insurance premium, and the child's extraordinary medical expenses be prorated between the parties in proportion to their incomes. As is evident from the analysis in Part II, this approach more appropriately compensates the parent incurring the expenses, particularly in situations when the other parent has relatively more income.

The current Guideline subtracts child care costs and the child's health insurance premium from one of the parent's incomes. Extraordinary medical expenses are variation and departure factors. The Commission's recommendations provide a more appropriate and equitable sharing of those expenses.

Recommendation 15: Eliminate the Custodial Parent Disregard

The Commission recommends eliminating the custodial parent income disregard, as well as the disregard for child care expenses, for several reasons.

The District of Columbia is one of only two states that provide a disregard for the parent to whom support is owed; that is, a specified dollar amount is subtracted from that parent's income prior to the calculation of the support order. This has the effect of increasing order amounts, particularly when the parent to whom support is owed has low income.

The original basis for the custodial parent disregard is unclear. The written reports from the original Guideline Commission state that the disregard was based in part on the assumption that an incentive was necessary to encourage work among support-receiving parents and that in the absence of a disregard, child support would operate as a disincentive for the support-receiving parent to work. This assumption is not corroborated by academic research or current trends. As is further discussed in Part II, academic research indicates that work and child support are complementary. Further, the more current view is that child support and work are both necessary to move families off public assistance and sustain them in the long term.

The Commission received some public comments supporting the continuation of the disregard to help low-income parents to whom support is owed achieve a higher standard of living. Although the Commission agrees with the principle of assisting low-income parents to whom support is owed, it believes that objective more appropriately can be achieved by changing the treatment of child care expenses, health insurance premiums, and extraordinary

medical expenses in the Guideline calculation. The Commission also recognizes that in many cases in the District of Columbia, the ability of parents to pay more child support is limited because many parents with a legal duty to pay support also have low incomes. Finally, because means-tested income is not included as income for child support purposes, many parents to whom support is owed will receive an “income disregard” even after the provision is removed from the Guideline. While this will help protect the lowest income support-receiving parents, it may be a burden for the lowest income support-paying parents. The Commission attempted to address this potential problem by including a self-support reserve, as discussed in Recommendation 16. The self-support reserve is not likely to solve the problem in its entirety, but the Commission determined that it would be better to err on the side of protecting children.

The Commission also received some public comments supporting the continuation of the disregard to compensate the support-receiving parent for the “opportunity costs” associated with being the primary caregiver for the child. While recognizing that there are “opportunity costs” associated with being the primary caregiver, the Commission also recognizes that there are “opportunity benefits” associated with the same. Moreover, there are “opportunity costs” and “opportunity benefits” associated with being the secondary caregiver, particularly in shared custody arrangements, which are becoming increasingly common in the District of Columbia in light of the joint custody presumption. Neither of these costs or benefits is readily quantifiable nor obviously more or less than the other. Finally, the Commission noted that, in many instances, the primary caregiver not only chose that role, but fought to keep it through a court case (i.e., fought to remain the primary caregiver and to minimize the other parent’s role in the child’s life). In sum, in many cases, the primary caregiver voluntarily assumed any “opportunity cost.”

Finally, regardless of the basis for the disregard, in practice, it causes great confusion and leads to the perception by many parents with a legal duty to pay support that the Guideline is unfair because the income of the parent to whom support is owed “does not count.” This is contrary to one of the Guideline’s underlying principles – to promote the appearance, in addition to the reality, of fairness.

The recommended change to the treatment of child care costs will be more helpful to working parents to whom support is owed than the current disregard. As further discussed in Part II, support orders will usually increase for support-receiving parents who incur child care costs even with the elimination of the disregard under the recommended formula.

Recommendation 16: Increase the Self Support Reserve and Revise the Low-Income Adjustment

The Commission recommends updating the self support reserve to 133 percent of the current (2004) U.S. Department of Health and Human Services poverty guideline for a single individual (\$12,382 per year). The self support reserve ensures that the parent with a legal duty to pay support is left with sufficient income after payment of child support to live at least at a subsistence level. The Commission recommends using 133 percent of the poverty

level for two reasons. First, the poverty guidelines are expressed as net income figures, while the Guideline is based on gross income. An upward adjustment to the poverty guideline therefore is in order to reflect a gross-income amount. Second, it is not uncommon to use a percentage multiple of the poverty guideline to determine income eligibility for public benefit programs (e.g., the Food Stamp program uses 185% of the poverty guidelines as its threshold). This assures that income is at least what is needed for a subsistence level of living and also recognizes the well-known limitations of the poverty measurement. The 133 percent amount is also consistent with the National Medical Support Working Group's recommended threshold for determining whether a parent with a legal duty to pay support has the ability to pay health insurance.¹⁰

The Commission also recommends that the adjustment for the self support reserve be the final calculation in the determination of support. (An example of this is illustrated in Exhibit I-3.) This ensures that the integrity of the self support reserve remains intact, particularly since add-ons to base support for child care, the child's health insurance premium, and the child's extraordinary medical expenses may be substantial. The adjustment for the self support reserve will be applied after those add-ons, thus providing maximum benefit to children without risking that a parent will cease to be self-supporting as the result of a child support obligation.

¹⁰The Medical Child Support Working Group, *21 Million Children's Health: Our Shared Responsibility*, Report to the Secretary of the Department and Health and Human Services and the Secretary of the Department of Labor. Available at the Federal Office of Child Support Enforcement website: http://www.acf.dhhs.govprograms/cse/rpt/medrpt/executive_summary.htm (June 2000).

| EXHIBIT I-3 ILLUSTRATION OF SELF SUPPORT RESERVE TEST AT THE END OF THE CHILD SUPPORT CALCULATION | | | | |
|---|--|---|---|----------|
| Part I. Basic Obligation | | Parent with a Legal Duty to Pay Support | Parent to Whom Support is Owed | Combined |
| 1 | Gross Income | \$15,000 | \$15,000 | |
| 1a | Other Child Support Paid | - \$0 | - \$0 | |
| 2 | Income Available for Child Support | \$15,000 | \$15,000 | 30,000 |
| 3 | Each Parent's Proportionate Share of Income Available for Child Support (Each Parent's Line 2 / Line 2 Combined) | 50% | 50% | 100% |
| 4 | Basic Obligation for One Child from Schedule using Combined Income Line 2 | | | \$6,205 |
| 5 | Each Parent's Share of Basic Obligation (Each Parent's Line 2 x Line 4 Combined) | \$3,102.50 | \$3,102.50 | |
| Part II. Additional Costs | | | | |
| 6 | Additional Costs paid by parents | | | |
| 6a | Health Insurance Cost | \$0 | \$0 | |
| 6b | Child Care Costs (if not paid directly to provider) | \$0 | \$0 | |
| 6c | Extraordinary Medical Costs (if not paid directly to provider) | \$0 | \$0 | |
| 6d | Other Extraordinary Costs | \$0 | \$0 | |
| 6e | Total Additional Costs (Sum of 6a through 6d) | \$0 | \$0 | \$0 |
| 7 | Each Parent's Share of Additional Costs (Each Parent's Line 3 x Line 6e Combined) | \$0 | \$0 | |
| 8 | Basic Obligation Plus Additional Costs (Line 5 + Line 7) | \$3,102.50 | \$3,102.50 | |
| 9 | Obligation Adjusted for Additional Costs Directly Paid (Line 8 - Line 6e) | \$3,102.50 | \$3,102.50 | |
| Part III. Self Support Reserve Test | | | | |
| 10 | Self Support Reserve for Parent with a Legal Duty to Pay Support (133% of poverty for one person) | \$12,382 | | |
| 11 | Income Available for Child Support for Parent with a Legal Duty to Pay Support (NCP Line 2 - Line 10) | \$2,618 | | |
| 12 | Support Order (Lesser of Line 9 or Line 11, or minimum order according to 16-916.01(e)(1)) | \$2,618 | | |

In addition, the Commission recommends that application of and deviations from the \$50 minimum order amount be clarified. The specific recommendation is shown in Exhibit I-4.

| EXHIBIT I-4 RECOMMENDED PROVISION PERTAINING TO MINIMUM SUPPORT ORDERS | |
|---|--|
| The presumptive, rebuttable minimum order shall be \$50 per month, where the court finds that the parent with a legal duty to pay support has the ability to pay the minimum order, while still meeting his or her own subsistence needs. The presumption can be rebutted downward to \$0 or upward above \$50 with evidence of resources and/or circumstances affecting the parent's ability to pay, including, but not limited to, age, employability, disability, homelessness, incarceration, inpatient substance abuse treatment, other inpatient treatment, or other appropriate circumstances. A minimum order below or above \$50 shall be supported by written factual findings. | |

Under the existing Guideline, parents with a legal duty to pay support who earn less than \$7,500 per year are supposed to be treated on a case-by-case basis, with a minimum

presumptive support order of \$50 per month. In practice, it appears from testimony and other sources that many judicial officers and the Child Support Enforcement Division of the D.C. Office of the Corporation Counsel (now the D.C. Office of the Attorney General) view the \$50 minimum as a required contribution irrespective of the individual circumstances. It further appears that \$7,500, which approximates the poverty level when the Guideline was developed, was intended to function as a self support reserve. Testimony from the public hearings also led the Commission to conclude that the self support reserve and low-income adjustment needed to be updated.

The Commission received some public comments criticizing the increase in the self support reserve from \$7,500 to \$12,382. The commenters argued that, for low-income families, the increase will place a disproportionate share of the child rearing costs on the parent to whom support is owed. Although the Commission agrees with the principle of assisting low-income parents to whom support is owed, it believes that objective more appropriately can be achieved by changing the treatment of child care expenses, health insurance premiums, and extraordinary medical expenses in the Guideline calculation.

The Commission also notes that the low-income parent to whom support is owed may be eligible for more means-tested public benefits than the low-income parent with a legal duty to pay support. Specifically, both low-income parents may be eligible for Food Stamps, public and subsidized housing, SSI benefits due to their own disability, and the Earned Income Tax Credit (EITC). However, the low-income parent to whom support is owed is likely to be eligible for greater amounts of some of these benefits. For example, where a parent to whom support is owed earns the District's minimum wage (\$6.15) in full-time employment (40 hrs/week for 50 weeks/year = \$12,300), s/he is eligible for the EITC; in contrast, where a parent with a legal duty to pay support earns the same, s/he is not eligible for the EITC.¹¹ Moreover, the low-income parent to whom support is owed may also be eligible for Temporary Assistance for Needy Families (TANF), Medicaid or D.C. Healthy Families coverage for themselves and their children, SSI benefits due to their child's disability, subsidized child care, and child care tax credits.

¹¹ In 2003, a single person must have earned less than \$11,230 from employment to qualify for the EITC; in contrast, a person with one qualifying child must have learned less than \$29,666 from employment to qualify for the EITC.

Finally, the Commission notes that the increase from \$7,500 to \$12,382 is not so much a true increase, as it is an adjustment for inflation.¹² In 1989, the self support reserve was \$7,500; in 2004 dollars, that is \$11,202.¹³ Stated another way, in 1989, the self support reserve was 125% of the poverty guideline (\$5,980) for a single person; in 2004, the self support reserve is 133% of the poverty guideline (\$9,310) for a single person.

In the final analysis, however, the Commission recognizes that the real problem with low-income families is a lack of sufficient income for both parents (i.e., there simply is not enough money to go around), which child support law and policy can only minimally address. Nonetheless, after considering the research and recommendations of the federal Office of Child Support Enforcement, as well as national policy groups, the Commission decided that the self support reserve is defensible as both a policy and practical matter. Specifically, the overwhelming evidence shows that support orders are most likely to be paid – meaning children are most likely to benefit – when they realistically reflect the ability to pay.

Recommendation 17: Set a Cap to the Order Amount that Reflects CCPA limits

The Consumer Credit Protection Act (CCPA) limits the amount of aggregate disposable earnings of an individual that can be withheld for child support. The limit ranges between 50 and 65 percent of net income, depending on whether the individual has other dependents and if there are child support arrears. The Commission recognizes that setting child support orders above the CCPA limits is likely to contribute to the accumulation of arrears that are not collectable. The Commission therefore recommends limiting the amount of child support to 35 percent of the noncustodial parent's gross income. The 35-percent level approximates the gross income equivalent of the 50-percent CCPA net income threshold. There is no such limitation in the current Guideline.

The Commission received public comment concerning the CCPA limit and recommending that it be accounted for in the Guideline. Similar limits have been promulgated in other states, in order to insure that child support orders do not offend the CCPA and to protect noncustodial parents from excessive obligations.

Recommendation 18: Eliminate Age of the Child Adjustment

¹² In criticizing the increase in the self support reserve, public commenters noted that, where the parent with a legal duty to pay support works full-time at a minimum wage job (40 hours/week x \$6.15/hr x 50 weeks/year = \$12,300), s/he will likely be ordered to pay only \$50 per month in child support. The Commission admits to this calculation, which is accurate regardless of whether the parent to whom support is earning nothing or equivalent minimum wage. However, the Commission also notes that the same would have been true in 1987-1990, when the current guideline was developed. Specifically, from 1987-1990, the minimum wage was \$3.35. See *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-1996*, U.S. Department of Labor, at <http://www.dol.gov/esa/minwage/chart.htm>. Where the parent with a legal duty to pay support was working 40 hours/week for 50 weeks/year (i.e., \$6,700/year), s/he would likely have been ordered to pay only \$50 per month in child support. See D.C. Code § 16-916.01(e)(2).

¹³ See Bureau of Labor Statistics (BLS) calculator at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

The Commission recommends eliminating the age of the child adjustment in accordance with the findings from the Betson-Rothbarth measurements of child-rearing costs, which form the basis of the proposed formula. The Betson-Rothbarth measurements, as well as the Betson-Engel measurements, do not indicate a significant difference in expenditures by age of the child.

The existing Guideline provides for an increase to the Guideline percentage of ten percent if the oldest child is between the ages of seven and twelve, and an increase of 15 percent if the oldest child is 13 to 21 years old. There are only four other state guidelines that adjust for age of the child.

Recommendation 19: Lower the Timesharing Threshold for Application of the Shared Custody Adjustment

The Commission recommends lowering the timesharing threshold for application of the shared custody adjustment from 40 to 33 percent. The recommendation recognizes the direct child-rearing expenditures incurred by parents with a legal duty to pay support, but who also have their children a substantial amount of time. Further, as evident in Part II, lowering the threshold eliminates the cliff effect— that is, a sudden decrease in the order amount as the child’s time with the paying parent increases from 39 to 40 percent. The 33 percent timesharing threshold results in a more gradual modification of the order amount as the paying-parent’s time with the child increases, which reflects the gradual increase in direct expenses for the child, as well as the gradual change in expenses for the other parent.

The Commission recognizes that there is no clear dividing line between expenses connected with visitation, for a parent who is not the child’s primary residential custodian, and expenses for care of the child by parents who are sharing residential custody, when the child spends more time in one household than the other. Some comments suggested that the shared custody adjustment should be applicable in all cases, based on the percentage of time each parent cares for the child. The Commission did not accept that position, because it is clear that when the child is primarily living with one parent, that parent’s expenditures to maintain the child are not significantly affected by the child’s visitation with the other parent. Establishing a reasonable threshold requires striking an appropriate balance, recognizing that both parents can be expected to bear some expenses for the child, even in non-shared custody situations.

The current Guideline provides for a discretionary adjustment when the child spends at least 40 percent of the time with the parent with a legal duty to pay support. Some public comment suggested that the threshold does not recognize the paying-parent's direct child-rearing expenses for substantial periods of time below 40 percent. The Commission has taken those comments into account in arriving at its recommendation to lower the threshold to 33 percent. A parent who is caring for the child 33 percent of the time can be expected to incur significant expenses for the child's basic needs. In addition, the majority of states with an adjustment set the threshold for application of the adjustment at 35 percent or less. Changing the threshold to 33 percent is also more consistent with District of Columbia law regarding joint custody and the actual practice of many families.

Recommendation 20: Apply the Shared Custody Adjustment Presumptively

The Commission recommends applying the shared custody adjustment presumptively if the timesharing criterion is met. The presumption is rebuttable: a parent who has the child less than 33 percent of the time may seek to establish that child support should be set using the shared custody adjustment because of the particular circumstances of the parties, such as unusual expenditures for the child borne by that parent; a parent who has the child more than 33 percent of the time also may seek to show that in the particular circumstances of the family, the shared custody adjustment should not apply. The burden would be on the party seeking to rebut the presumption to establish that it should or should not be applied in the particular case.

The recommendation acknowledges that District of Columbia law presumes it is in the best interest of children for both parents to be active in raising their child and that the contributions of paying parents who are substantially involved in child rearing should be consistently recognized. This recommendation accomplishes the goal of encouraging the involvement of both parents with their children, rather than encouraging parents simply to be better payers.

The current Guideline provides for a discretionary adjustment. Public comments suggested that the Guideline would be more equitable if it more appropriately and consistently considered situations where both parents are substantially involved in the raising of the child. This recommendation puts the Guideline more in harmony with the joint custody presumption in current District of Columbia law.

Recommendations on Variation and Departure Factors

Recommendation 21: Eliminate the Variation Provision through Consolidation with the Departure Factors

The Commission recommends eliminating the plus or minus three-percent variation provision, which permits a range for the presumptive Guideline amount. The rationale for

eliminating the variation range is that it serves the same purpose as the departure factors, but its application can result in significant disparities in treatment of persons who otherwise appear to be similarly situated. Instead, the Commission recommends that departures be made for articulated reasons, based on the circumstances of the child and the family. Under this recommendation, the factors listed in the variation provision would be merged with the factors listed in the departure provision, so that there would be one list of departure factors for the court to consider.

The current variation provision is similar to the departure factors. No other state has separate variation and departure factors in its Guideline.

Recommendation 22: Add Additional Departure Factors

Based on the comments received and the experience with the current Guideline, the Commission recommends adding the following departure factors:¹⁴

- The parent with a legal duty to pay support is 18 years old or younger and a full-time student; and
- The child is a respondent in an abuse or neglect case and has been placed outside the home and the goal of the case is reunification with the parent(s).

These issues are not addressed in the current Guideline, but they were raised before the Commission. The Commission thought it important to address these issues, which may occur with some frequency in our jurisdiction.

Other Recommendations

Recommendation 23: Require Inquiry as to Child Support in Domestic Relations and Domestic Violence Cases

The Commission recommends adding a provision that will require the court to make an inquiry regarding the child support arrangements in every domestic relations and domestic violence case. Further, if the parent entitled to child support has not requested support, or the parents have agreed against the entry of a child support order, the judicial officer shall advise the parents, regardless of whether they are represented by counsel, as to the entitlement to child support pursuant to the Guideline. The inquiry is intended to safeguard the best interests of the children in all domestic relations and domestic violence actions.

¹⁴ In its initial recommendations, the Commission also recommended adding a departure factor for cases in which the addition of costs for child care, health insurance premiums or extraordinary medical expenses created an extraordinary hardship for the parent with a legal duty to pay support. However, after considering public comment opposing this addition, the Commission decided to eliminate this proposed departure. In doing so, the Commission noted that the concern raised by the departure factor is already addressed in the placement of the self-support reserve as the last step in the child support calculation. One member of the Commission did not support a departure for a parent 18 years of age or younger.

Currently, a parent to whom support is owed must file a complaint specifically seeking child support from the parent with a legal duty to pay support in order to receive an award of support. If the parent to whom support is owed does not request it, child support may or may not be considered in other actions where the children may be at issue (e.g., custody, divorce, legal separation, domestic violence, paternity). There is some concern under the current practice that the courts may inconsistently inform parents of their right to child support and/or that parents may not be fully aware of their right to child support. The Commission does not intend that the court be required to order child support if the parents have made other private arrangements that are satisfactory to them, but it does want to insure that some inquiry is made so that child support is not ignored.

Recommendation 24: Limit Retroactive Support

The Commission recommends adding a provision that would limit retroactive support to 24 months prior to the date of filing of the request for support,¹⁵ in most cases. If the court determines that the parent with a legal duty to pay support has acted in bad faith or in other extraordinary circumstance (such as when a parent to whom support is owed is afraid to request child support because of domestic violence or other threats by the other parent), the court may order retroactive support for a longer period. Similarly, if the court determines that an award of 24 months of retroactive support would be inequitable or create an extraordinary hardship, the court may order retroactive support for a shorter period or no retroactive support at all. The Commission further recommends that when the court determines, based on competent evidence, that voluntary payments were made by the parent with a legal duty to pay support during the retroactive period, those payments be credited against any award of retroactive support.

The Commission engaged in lengthy discussions of the issues surrounding this recommendation. Although not specifically addressed in the Guideline, D.C. case law has established that child support can be awarded retroactive to the birth of the child. While the Commission recognizes the right of the child, and considered whether its recommendation impermissibly restricts that right, the Commission also recognizes that national policy organizations, such as CLASP and the Urban Institute, support limits. Their research and other studies conclude that unlimited retroactive support often results in uncollectible arrears, especially for low-income parents with a legal duty to pay support – a large portion of the District’s child support population. These uncollectible arrears can discourage payments on current support, as well as continued parental involvement. The Commission noted that payment of current support is particularly important in the current time-limited welfare system and that studies show that the older the arrears, the less likely they will be collected. The accumulation of this debt frustrates and produces a bad image for both the parent with a legal duty to pay support and for the child support agency.

The Commission’s deliberations also centered on the purpose of the Guideline. One goal of the Commission in recommending changes to the existing guidelines is to create certainty in child support awards. A limit on retroactive support creates certainty. Further, Commissioners discussed how a limit on retroactive support encourages parents to establish paternity and a support order early in the child’s life.¹⁶ This is in the child’s best interest, as it fosters early financial support and parental involvement.

¹⁵ One public commenter inquired as to the applicability of the 24-month limit in non-support cases (e.g., divorce and/or custody cases). It is the Commission’s recommendation that the 24-month limit apply to all requests for child support, regardless of whether they are initiated in the Paternity and Support Branch or in the Domestic Relations Branch.

¹⁶ It appears that many cases of significant arrears arise from a parent’s failure or refusal to name a child’s father when the parent begins receiving TANF and other public benefits. A change in District policy would allow better collection of support from parents and better reimbursement of benefit payments to the District. It would also provide children with more and better opportunities to have two involved parents.

In addition, the Commission's deliberations referred to current practices, where some child support enforcement attorneys use the threat of retroactive support in a heavy-handed manner, thereby coercing parents with a legal duty to pay support to agree to current support orders and/or retroactive judgments that are higher than they can afford. Related to this were questions regarding who should bear the legal and evidentiary burden of proving a right to or limit on retroactive support and who has better access to counsel to litigate these issues.

After carefully weighing these issues, a majority of the Commission concluded that there are situations where retroactive support is appropriate and that the two-year period is a reasonable time for a retroactive award in most cases, absent bad faith or other extraordinary circumstances, and taking into account the needs of the child and the parent's ability to pay.¹⁷

Although there may be issues regarding proof of voluntary payments, courts regularly resolve factual disputes. The Commission also appreciates that parents often recognize their responsibilities to support their children, without a court proceeding, and does not want to discourage parents from providing support voluntarily. On balance, the Commission concluded that voluntary payments should be credited against any retroactive award, if those payments can be proved.

Recommendation 25: Revise the Change in Circumstances Criterion for Review and Modification

The Commission recommends revising the review and modification provision such that a change in the Guideline alone may amount to a substantial change in circumstances. This allows for either parent to seek modification if the revised Guideline results in an order that differs from the existing order by 15 percent or more. The current Guideline does not allow a change in the Guideline to qualify as a substantial change in circumstances for the purposes of review and modification, if no other change in circumstance exists.

The Commission's recommendation is based on a principle of fairness. Since the revised Guideline is fairer and will result in more appropriate order amounts, its application should not be limited to cases that arise after the revised Guideline is adopted. On the other hand, it would be an unreasonable administrative burden for all child support orders to be subject to modification based on the new Guideline. The 15 percent test is based on the definition of a substantial change in circumstances in the existing law, which continues to be a reasonable approach.

CONFORMING AMENDMENTS

¹⁷ Two Commission members preferred that the Guideline not include any limitation on retroactive support. One Commission member preferred that retroactive support be limited to one year.

Some of the proposed recommendations to the Guideline, if adopted, will require revisions to other parts of the D.C. Code, including, but not limited to, the following:

- Delete D.C. Code § 16-916(f) regarding retroactive support, as retroactive support is addressed in the proposed Guideline at § 16-916.01(t).
- Amend D.C. Code § 46-205(5) and 46-207(b)(6) by replacing the word “obligor” with “obligor or obligee” through the subsection.
- Amend D.C. Code § 46-206 by adding a subsection (7), and 46-207(b) by adding a subsection (9), as follows: “Notice that, for extraordinary medical expenses not addressed by the support order, each parent must pay such expenses in proportion to his or her share of the parents' combined gross income if, as and when such expenses are incurred. If either parent advances payments for such expenses to a provider of services, the other parent shall reimburse that parent for his or her proportionate share of expense within 30 days of receiving written proof of the expense. Extraordinary medical expenses, including copayments and deductibles, are uninsured or unreimbursed medical expenses in excess of \$250 per year per child at issue in the instant case.”

OTHER CONSIDERATIONS

The following factors were considered by the Commission, but did not result in a recommended change to the Guideline:

- *Guidelines Model.* The Commission reviewed various guideline models, including those that are used by other states and those that have been proposed, but have not been adopted or are not in use in any jurisdiction (e.g., the American Law Institute and the Cost Shares models). The Commission determined that the proposed formula was the most appropriate for the District of Columbia.
- *Income Basis of Guideline.* There was a public comment favoring a net-income-based Guideline over a gross-income-based Guideline. The Commission decided to continue to base the Guideline on gross income. Gross income is easier to quantify than net income. Further, using net income would result in significantly greater complexity in calculating support and would provide parents with more opportunities to hide income. In practice, the use of gross income has worked well.
- *Fluctuating Income and Overtime Pay.* The Commission did not see a need to refine the treatment of fluctuating income and overtime pay. The current practice of including or excluding fluctuating income on a case-by-case basis is appropriate and does not appear to result in unequal treatment of similarly situated individuals. Overtime pay is currently included in the definition of gross income.
- *Tax Credits.* There were public comments favoring the consideration of tax credits, specifically the Earned Income Tax Credit and child care tax credits, in calculating the adjusted gross income of the parent to whom support is owed. The Commission decided to exclude such tax credits from the definition of adjusted gross income for

three primary reasons: first, such tax credits are too prospective to accurately calculate (i.e., the availability and amount of any such credits cannot be accurately determined at the time the order is set); second, even if accurately calculated, such tax credits are not universally utilized;¹⁸ and third, calculation of such tax credits does not further the goal of predictability, nor ease the administration of child support orders.

- *Age of Majority.* The age of majority is defined in D.C. Code § 46-101, and is not a part of the Guideline.
- *Children with Special Needs or Abilities.* This is currently a plus or minus three-percent variation factor, which will become a departure factor under Recommendation 21.
- *Cost of Private School.* The existing departure factors allow for the consideration of private school on a case-by-case basis, as does current District of Columbia case law.
- *Split Custody Arrangements.* Split custody (i.e., at least one child lives with each parent) is not currently addressed in the Guideline. The Commission did not find it necessary to address split custody in the Guideline, because split custody is sufficiently uncommon that it more properly is addressed on a case-by-case basis.
- *Incarcerated Obligor.* In response to public comment, the Commission also discussed whether it would be appropriate to provide for automatic suspensions of child support orders for incarcerated parents with no ability to pay. Case law from the District of Columbia Court of Appeals already permits a suspension, but only when the incarcerated parent files a motion seeking it. Because many incarcerated parents are unaware of the need to file a motion, or are unable to file it while incarcerated, the current approach is limited in its effectiveness. As a result, many incarcerated parents are released from incarceration with thousands of dollars in child support arrears which can further hinder their ability to transition back into their families and the economy. While recognizing the inadequacies of the current approach, the Commission ultimately concluded that this was not a Guideline issue, but one that should be addressed by the Council through separate legislation.
- *Indexing.* After considering a suggestion made during public comment, the Commission declined to provide for an automatic update to the low income adjustment and the self support reserve based on changes to the federal poverty guideline. The Commission decided not to adopt this recommendation because it would be difficult to implement and would compress the range of incomes within the next higher level of the formula. The Commission believes it can effectively address changes in the poverty guideline during its regular review of the child support Guideline every four years.
- *Cost of Living Adjustments.* After weighing the merits and limitations of COLAs, the Commission decided against them. The merit of COLAs is that they automatically increase child support awards periodically without going through the review and adjustment process. The limitations are that they can be difficult to implement and they

¹⁸ See *Do You Work? Have Children? The IRS May Owe You Thousands of Dollars*, National Women's Law Center, at <http://www.nwlc.org/details.cfm?id=1750§ion=newsroom>.

assume that the parents' incomes keep pace with inflation, which often is not the case, especially with low-income earners.

- *Application to Administrative Processes.* There was a public comment suggesting that the proposed Guideline be applicable to both judicial and administrative processes for establishing and modifying support orders. It is the Commission's understanding that there is no administrative process currently in place for establishing and modifying child support orders and that all orders must be established through the judicial process. A recommendation to extend the Guidelines to administrative proceedings therefore would be premature at this time. In principle, however, the Commission does not oppose extending the proposed Guideline to administrative proceedings, once such a process is established.
- *Petitions to Establish Support.* It is the Commission's understanding that the Paternity & Support Clerk's Office will not accept petitions to establish support filed by parents with a legal duty to pay support – it will only accept them from parents to whom support is owed. The Commission is not aware of any legal impediment to allowing either parent to file a petition to establish support and, although not an issue properly addressed in the Guideline, the Commission recommends that the Clerk's Office change its practice immediately.